80-143

Supreme Court, U.S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

THELMA M. DETWEILER, 1980 Term
No._____

Petitioner

vs.

MERRILL M. DETWEILER,

Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Sanford H. Cohen, Esq.

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J. 1324/79

MERRILL M. DETWEILER,

Appellee

vs.

THELMA M. DETWEILER,

Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3010, October Term, 1978

Appeal from the Order of October 20, 1978
Court of Common Pleas of Montgomery
County, Pennsylvania
Civil Action, Law No. 77-8677

Before CERCONE, P.J., HOFFMAN, J. and
WATKINS, J.

MEMORANDUM OPINION

Appellant (wife) in this divorce action contends that: (1) the lower court erred in reviewing the master's findings of credibility; (2) appellee (husband) failed to show indignities to the person; and (3) the husband was not the innocent and injured party. We disagree with appellant and accordingly, affirm the

order of the court below granting a divorce a.v.m.

The parties were married on June 1, 1958. The wife became pregnant in 1960, 1963 and 1968.[1] The children, each of whom suffered from severe birth defects, died shortly after birth. Although the parties developed sexual problems as a result of the deaths of their first two children, in 1968 they mutually planned the third pregnancy with the understanding that it would be the last. After the death of the third child, however, the parties' sexual problems increased and the husband began sleeping in a separate bedroom for varying periods of time.

In 1968 the wife began physically and verbally abusing her husband. She frequently hit him in the face and scratched his neck and back.[2]

As a result of these difficulties, the husband counselled with several ministers for a four to five month period. The husband's uncontroverted testimony also indicated that he discontinued his activities outside the home in 1968 in response to his wife's complaints that something was wrong.

After the third abnormal birth the wife cancelled the husband's scheduled vasectomy because she felt the operation would not solve the parties' sexual problem.[3] In 1971, the husband again undertook pastoral counselling but the wife refused to participate because she believed the advice of the clergy was male-oriented. The husband then sought consultation with a female psychologist but the wife refused to accompany him on his visits to her.

When the wife became pregnant for a fourth time in the spring of 1972, the violence and discord between the parties grew. The wife continued to strike and scratch her husband who occasionally responded by striking her. After the birth of their normal daughter, Valerie, the wife increased the number of attacks on her husband and threatened to harm Valerie if he did not "make things right".

In September of 1972, the husband left the home but returned upon his wife's request in January of 1973.[4] Several weeks later, however, the wife once again began to abuse her spouse verbally. She frequently made statements such as: "being married to you is a big tragedy"; "your love is like garbage"; "our marriage is worse than a concentration camp" and although he loved her

the feeling was "only one way". On three occasions, from 1973 to 1974, the wife brought a butcher knife to her husband and asked him to kill her because he had taken everything else from her, and might as well take her life. On the parties' fifteenth wedding anniversary, in response to the husband's wishes for a happy anniversary, the wife responded that being married to him was "a big tragedy" and refused to open her gift. In 1975 the wife returned to school because she felt that she was wasting her potential. The husband finally left home in January of 1978 because his wife told him the night before that he was worse than any drunk out in the street. In March of 1978 the husband filed for a divorce on the ground of indignities to the person. A master's hearing was

held in January of 1979.

The master recommended that the divorce be denied. He concluded that the parties' problems resulted from the husband's "insatiable drive" to reproduce. The lower court, however, rejected this conclusion, noting to the contrary that the wife had become pregnant only four times in eighteen years of marriage, had refused to use any means of birth control, and agreed to the third pregnancy, and had cancelled the husband's appointment for a vasectomy in 1971.

The lower court also rejected the master's finding that the wife was "a person of greater sensibility and deeper intellect" than the husband and that the deaths of their children therefore had a greater impact on her, justifying her abuse of her husband. This conclusion was not supported by

the facts as viewed by the lower court because the husband gave up his outside activities in 1968 in order to spend more time with his wife, he sought help from a female counsellor in response to her complaints, he supported her decision to return to school, he left home because he could see that remaining together was harming everyone involved, and after leaving home the husband continued to support his family voluntarily. The wife, however, threatened to strangle her daughter or to throw her out of the window if her husband did not correct the problems with their marriage. The lower court, therefore, declined to follow the master's recommendation and granted the divorce on the ground of indignities.

Appellant's contention that the lower court improperly rejected the

master's findings of credibility is without merit. Generally, "[t]he lower court need not accept the findings of the master and can make its own determination. Our Court is also duty-bound to make a complete and independent investigation of the evidence in order to discharge our obligation." Ryave v. Ryave, Pa. Superior Ct. , , 375 A.2d 766, 770 (1977) (citations omitted). Where issues of credibility best resolved by personal observation are involved, however, the reviewing court must give great weight to the findings of the master. Gehris v. Gehris, 233 Pa. Superior Ct. 144, 148, 334 A.2d 753, 755 (1975). But even in matters of credibility, the master's findings may be rejected where the court determines that those findings have no basis. Ryave v. Ryave, supra.

In the case at bar, the lower court properly made an independent review of the testimony presented at the master's hearing. Our de novo review of the record confirms the conclusion that despite the weight accorded the master's determination of credibility two of the findings were without foundation. The wife admitted that she had refused to use any means of birth control, that she had opposed her husband's vasectomy, and that she had agreed to the third pregnancy. It is difficult to comprehend, therefore, how the master could have accepted the wife's assertion that her husband was using her as a "baby machine". Similarly, the conclusion that the wife's actions were justified by her more sensitive and intelligent nature was unjustified. The husband's frequent

consultation with counsellors reveals a sensibility to the problems encountered by the couple in their marriage. Moreover, he attempted to consult with a female psychologist in order to be responsive to his wife's wishes. The husband gave up his activities outside the home in response to his wife's complaints about their marriage, and he continued to support the family even after he deemed reconciliation impossible. In addition, the husband financially supported her return to college and accepted some of the burden of housework so that she could study. The wife, on the other hand, manifested insensitivity by making cruel statements to her husband, including threats that she would throw her daughter out of the window or strangle her if her husband did not "make things right". On these facts, we conclude that the lower

court was correct in rejecting the master's findings that the wife was the more sensitive and intelligent spouse.

Appellant's second contention is equally without merit. Indignities "may consist of vulgarity, unmerited reproach, habitual contumely, studied neglect, intentional incivility, manifest disdain, abusive language, or malignant ridicule". Hargrove v. Hargrove, Pa. Superior Ct. , , 391 A.2d 143, 148 (1977). Moreover, the conduct of the offending spouse must be such as to render the innocent spouse's life burdensome or condition intolerable. 23 P.S. §10(1)(f). The wife herein subjected her husband to continual verbal and physical abuse[5] and threatened their child. As a result of this conduct, the husband's condition

was rendered so intolerable that he left the marital abode. We conclude that the wife's course of conduct rose to the level of indignities.

Appellant's final contention is that the husband was not the innocent and injured spouse. See 23 P.S. §10(1). In order to be innocent and injured within the meaning of the divorce statute, a party need not be wholly free from fault. McCaskey v. McCaskey, Pa. Superior Ct. , 385 A.2d 378 (1978). Although the husband in this case did occasionally retaliate against his wife's physical abuse by slapping her and tended to be verbally unresponsive to her complaints, his actions did not justify those of the wife. We therefore conclude that the husband was the injured and innocent spouse. Consequently, we affirm the order of the court below granting a divorce a.v.m. on the ground of

indignities to the person.

Order affirmed.

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1. In 1963, shortly after the death of the second child, the parties adopted an infant girl, and in 1972, the wife gave birth to a normal baby girl.

2. At the master's hearing, the husband presented a witness who corroborated his testimony regarding the scratches on his face and neck.

3. The husband did eventually obtain a vasectomy without his wife's permission in 1975.

4. The husband left the home several times between 1971 and 1977 for periods ranging from a few days to several

months.

5. The master did not consider the physical abuse of the husband in reaching his decision because he concluded that the concept of condonation applied. Where, however, subsequent to a reconciliation new acts of indignity occur, the old conduct is revived and will be considered by the court. See Schwartz v. Schwartz, 193 Pa. Superior Ct. 628, 630, A. 2d , (1960).